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NO. 07-1347

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IN THE

Supreme Court of the United States

EBEN ALEXANDER III, M.D.,

Petitioner,

v.

BRIGHAM AND WOMEN'S PHYSICIANS ORGANIZATION, *et al.*,

Respondents.

ON PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIRST CIRCUIT

BRIEF IN OPPOSITION

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COUNTER-STATEMENT OF QUESTIONS PRESENTED

1. Is "individual bargaining power," which is nowhere referenced in the statute, and which would render impracticable most plans covering multiple employees, an ERISA "top hat" requirement?

2. Is a group of highly compensated surgeons comprising less than nine percent of the workforce a "select group" under ERISA's "top hat" exception?

CORPORATE DISCLOSURE STATEMENT

Pursuant to Supreme Court Rule 29.6, Brigham and Women's Physicians Organization, Inc. ("BWPO") and Boston Neurosurgical Foundation Inc. ("BNF") hereby disclose that BWPO's parent corporation is Brigham and Women's/Faulkner Hospitals, Inc. No publicly held company owns 10% or more of its stock. BNF does not have a parent corporation, nor does any publicly held company own 10% or more of its stock.

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Respondents respectfully request that the petition for writ of certiorari to review the judgment of the United States Court of Appeals for the First Circuit be denied.

STATEMENT OF THE CASE

I. FACTUAL BACKGROUND

A. The Brigham Surgical Group Foundation

The Brigham Surgical Group Foundation ("BSG") was[1] a non-profit, tax-exempt organization established pursuant to Internal Revenue Code § 501(c)(3). *Alexander v. Brigham & Women's Physicians Org., Inc.*, 467 F. Supp. 2d 136, 138-39 (D. Mass. 2006). BSG's members constituted the Department of Surgery at Brigham and Women's Hospital and also served on the faculty of Harvard Medical School, teaching surgery to medical students. *Id.* at 139.

BSG members directly elected the organization's Board of Directors. *Alexander v. Brigham & Women's Physicians Org., Inc.*, 513 F.3d 37, 41 (1st Cir. 2008). Through its Executive and Compensation Committees, the Board, in turn, managed how BSG paid its members, and was responsible for BSG's deferred compensation arrangements. *Alexander*, 467 F. Supp. 2d at 141. Many BSG members served on the Board of Directors and

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1. Respondent Brigham and Women's Physician Organization, Inc. became the corporate successor to BSG in 2001. *Alexander*, 467 F. Supp. 2d at 138 n.1. Because both decisions below refer to these entities collectively as "BSG," Respondents will subscribe to this abbreviation.

the Executive Committee, and therefore had a direct voice in how they and their peers were compensated, including who was eligible to participate in the deferred compensation plans. *Id.*

B. BSG Compensation and the Unfunded Plans

Under I.R.C. section 501(c)(3), a non-profit entity must place reasonable limits on its employees' income so that the entity's earnings do not "inure to the benefit of private individuals." *Id.* at 139 (citing 26 C.F.R. § 1.501(c)(3)-1(c)(2)). Harvard Medical School therefore established a cap on BSG employee salaries. *Id.* This made recruiting and retaining world-class surgeons difficult for BSG. *Id.*

To offer competitive compensation while complying with the salary cap, BSG established two unfunded deferred compensation plans: the Faculty Retirement Benefit Plan ("FRBP") and the Unfunded Deferred Compensation Plan ("UDC," and, collectively, the "Plans"). *Id.* at 138. Eligible for the FRBP were those surgeons who were members of BSG, full-time faculty members of Harvard Medical School, and, most importantly, generated a net practice income ("NPI") greater than the BSG salary cap in the previous year.[2] *Id.* at 139. To be eligible for the UDC, a surgeon needed to be fully eligible for the FRBP and generate NPI more than twenty-five percent above the salary cap. *Alexander*, 513 F.3d at 40. No surgeon could choose to

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2. Net practice income is the net of payments for the surgeon's services rendered less BSG's costs allocable to those services. *Alexander*, 513 F.3d at 40.

contribute any money into a Plan if he was not fully eligible for it. *Id.* at 40-41. If a participant in a Plan generated NPI below his base salary in a given year, that amount would be deducted from the surgeon's accumulated deferred compensation account. *Id.*

BSG expressly intended that the Plans would satisfy ERISA's top hat criteria, and it projected that only a small number of surgeons—no more than ten percent—would ever meet all three requirements to be eligible for either plan. *Alexander*, 513 F.3d at 40-41; *Alexander*, 467 F. Supp. 2d at 140. This calculus proved accurate: at no time were more than twenty-one employees (8.7 percent of the BSG workforce) eligible for the FRBP, or more than fourteen (5.8 percent) eligible for the UDC.[3] *Alexander*, 467 F. Supp. 2d at 140-41.

C. BSG Members' Ability to Affect the Terms of the FRBP and UDC

BSG's members were able to, and did, alter the provisions of the Plans. *Alexander*, 513 F.3d at 41. In fact, the surgeons suggested at least two modifications to the Plans, one of which was adopted by the Board's Executive Committee in 1990. *Id.*

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3. For the FRBP, only 8.7 percent of BSG employees were eligible in 1997, 6.2 percent in 1998, and 4.9 percent in 1999. *Id.* at 140. For the UDC, only 5.8 percent were eligible in 1997, 3.3 percent in 1998, and 3.1 percent in 1999. *Id.*

D. Petitioner's Participation in the Plans

Petitioner was a highly compensated surgeon with BSG, and member of the Harvard Medical School Faculty, from 1988 until 2001. *Id.* at 40. During his tenure with BSG, Petitioner generated NPI surpluses in various years and therefore contributed to both the FRBP and the UDC. *Id.* at 41 n.4. However, because Petitioner incurred massive NPI deficits in the last few years before his departure, BSG debited his accounts the cumulative total of those shortfalls at his termination. *Id.* at 41; *Alexander*, 467 F. Supp. 2d at 140.

II. DECISIONS BELOW

A. The District Court's Rulings

Petitioner sued Respondents in the District Court for the District of Massachusetts in 2004, asserting various claims under state law and ERISA. *Alexander*, 467 F. Supp. 2d at 138. The court dismissed the state law claims as preempted, and conducted a bench trial in October 2006 on the rest. *Id.* At trial, Petitioner advanced three arguments: that the Plans were not "maintained primarily for the purpose of providing deferred compensation;" that the Plans were not maintained for a select group; and that the Plans did not qualify as top hat plans because Petitioner lacked "individual bargaining power" to affect their terms. *Id.* at 142.

In a comprehensive and well-reasoned decision, Chief Judge Wolf rejected each of Petitioner's arguments. The court first found that the Plans were

unfunded and maintained primarily for the purpose of providing deferred compensation under the applicable section of ERISA, 29 U.S.C. § 1051(2) (matters not raised by Petitioner on appeal and thus waived). *Id.* at 142. It next found that the Plans were maintained for a select group of highly compensated employees because only a small fraction of BSG employees (never more than 8.7 percent), who earned substantially more than their co-workers, ever contributed to either Plan. *Id.* at 144. Finally, the court held that, although BSG surgeons *had* the "ability to modify the plans and used it," "individual bargaining power" is not a top hat plan requirement. *Id.* at 145-47.

Finding that the FRBP and UDC were valid top hat plans, the District Court determined that the ERISA vesting and fiduciary responsibility requirements did not apply, and entered judgment for Respondents. *Id.* at 148.

B. The Court of Appeals' Decision

A panel of the Court of Appeals for the First Circuit unanimously affirmed the trial court's decision. It agreed that the small number of well-paid surgeons who actually contributed to the Plans were a select group of highly-compensated employees. *Alexander*, 513 F.3d at 44. The Court further found that individual bargaining power was not an element of the top hat test, both because the text of ERISA contains no such requirement, and because no legislative history points to such a requirement. *Id.* at 46-47.

REASONS FOR DENYING THE PETITION

I. THE COURTS BELOW DECIDED THIS CASE CORRECTLY

Certiorari should be denied because the District Court and the Court of Appeals correctly interpreted and applied ERISA. The FRBP and UDC were maintained for a select group of BSG employees only, and Petitioner's inability to negotiate over the Plan terms is of no consequence.

A. The Plans Were Only Maintained for a "Select Group"

The First Circuit properly found that BSG "maintained" the FRBP and UDC for a "select group" of highly profitable surgeons only. *Alexander*, 513 F.3d at 44. Because this holding is based on "[c]ommon sense" and "an unforced reading of the statutory text," no further review is necessary. *Id.*

As the First Circuit recognized, the contours of a "select group" are defined by the set of employees for whom the top hat plan is "maintained."[4] *Alexander*, 513 F.3d at 44; *see* 29 U.S.C. § 1051(2). Said differently, a select group is comprised of those employees who *realistically* can benefit from the plan, and for whom the money in the plans is *actually* being managed and held. *Alexander*, 513 F.3d at 44. Individuals who were

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4. The statutory verb on which the decision rests is "maintained;" Petitioner focuses on those to whom the Plans were "offered."

not intended to be a part of the plan, and for whom the plan is not administered, are therefore not part of the select group. *Id.* at 44-45.

Petitioner asserts that, because all BSG surgeons *hypothetically* could have generated sufficient profits to be eligible for the Plans, they constitute the proper analytical cohort for the select group analysis. *See* Petition for Writ of Certiorari ("Pet.") at 24. This argument ignores not only the plain language of the statute, but also the fact that the Plans had *three* requirements for eligibility: membership in BSG, a full-time faculty position with Harvard Medical School, *and* a sufficiently large NPI surplus. The contention that more than 8.7 percent of employees might conceivably have become eligible for the Plans if one or more of these requirements was disregarded is academic.

Petitioner's reliance on *Demery v. Extebank Deferred Compensation Plan (B)*, 216 F.3d 283 (2d Cir. 2000) also is misplaced. In *Demery*, the company offered approximately fifteen percent of its employees the opportunity to enter into a *voluntary* top hat plan. *Id.* at 285. The plan was maintained for this group of employees because all of them could have chosen to join at any time. *See id.* In contrast, BSG surgeons had *no* ability to voluntarily join either the FRBP or UDC. Once all three eligibility criteria were met, their contributions were automatic. Further, if an employee did not meet *all* Plan criteria, they could not contribute to either Plan. *See Alexander*, 513 F.3d at 44-45. BSG maintained the Plans for this smaller set of employees, not all surgeons

as Petitioner contends.[5] Since the Court of Appeals correctly decided the select group issue, no further review is warranted.

B. Individual Bargaining Power is Not Required By the Statute

The Court of Appeals also correctly decided that Petitioner's purported lack of individual "bargaining power" did not affect the Plans' top hat status. As the First Circuit noted, "neither the text nor the legislative history of [29 U.S.C. § 1051(2)] contains the slightest hint that Congress contemplated that courts would consider employees' ability to bargain over the terms of their deferred compensation plans." *Alexander*, 513 F.3d at 48. In its decision, the Court of Appeals simply hewed to the plain text of the statute.

Despite the striking absence of any such statutory requirement, Petitioner nonetheless asserts that "every member of the select group for whose benefit a top-hat plan exists must possess bargaining power sufficient to influence the terms of the plan; elsewise, the plan cannot qualify for the exemption." *Id.* at 46; *see* Pet. at 13-24. For this unfounded and unworkable[6] proposition,

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5. Petitioner's argument that the statutorily defined term "Participant" be imported into the top hat plan analysis (Pet. at 30) is also unfounded, since the word "participant" is not in the pertinent section of the statute, 29 U.S.C. § 1051(2). *See Alexander*, 513 F.3d at 45.

6. Under such a requirement, an employer with thousands or tens of thousands of employees would be hard-pressed to maintain a top hat plan for the dozens or hundreds of employees who might otherwise be eligible if the terms of the plan had to be negotiated by each employee.

Petitioner relies principally on a passing comment in one Department of Labor Opinion Letter, DOL Op. No. 90-14A. *See* Pet. at 14, 16. This argument is weightless for two reasons. First, the Opinion Letter does not purport to interpret the statute, but rather offers the Department's conjecture regarding certain Congressional considerations that led to the top hat exception.[7] DOL Op. No. 90-14A; *see Alexander*, 513 F.3d at 47. Second, the Opinion Letter did not address facts even remotely similar to those present in this case.[8] *See Alexander*, 513 F.3d 47-48.

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7. The pertinent section of the Opinion Letter reads:

> It is the view of the Department that in providing relief for "top-hat" plans from the broad remedial provisions of ERISA, Congress recognized that certain individuals, by virtue of their position or compensation level, have the ability to affect or substantially influence, through negotiation or otherwise, the design and operation of their deferred compensation plan, taking into consideration any risks attendant thereto, and, therefore, would not need the substantive rights and protections of Title I.

8. Even if bargaining power was somehow an element of the top hat analysis, the District Court found that Petitioner and his fellow BSG surgeons did possess the power to alter the terms of the Plans, and used it. *See Alexander*, 467 F. Supp. 2d at 146-47; *see also Alexander*, 513 F.3d at 48.

II. THE ISSUES PRESENTED ARE NOT SUFFICIENTLY IMPORTANT, AND NOT ADEQUATELY DEVELOPED, TO JUSTIFY REVIEW BY THIS COURT

Certiorari should also be denied because the questions presented do not warrant the Court's attention. They are narrow in scope and involve aspects of a minor exception to ERISA. Likewise, the Courts of Appeals have not given these rarely-litigated issues significant examination. Indeed, Petitioner identifies only *two* Circuit Court decisions as conflicting with the decision below. Because these issues are as undeveloped as they are insignificant, certiorari should be denied.

A. The Present Issues Are of Negligible Significance

Certiorari is unnecessary because the issues are not of sufficient importance to justify this Court's notice. The Court is not in the business of answering questions that do not go "beyond the academic or the episodic." *Rice v. Sioux City Mem'l Park Cemetery*, 349 U.S. 70, 74 (1955). Rather, it reserves its attention for issues of substantial consequence. *Cf.* Sup. Ct. R. 10(a).

The top hat plan is a barely-used exception within the vast ERISA framework. The Employee Benefits Security Administration oversees more than 700,000 ERISA retirement plans on an ongoing basis.[9] In

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9. *See* Employee Benefits Security Administration, Organization Chart, http://www.dol.gov/ebsa/aboutebsa/org_chart.html#section1 (last visited June 5, 2008).

contrast, since 1990, only 87,293 top hat plans have registered with the Department of Labor.[10] This averages to 4,850 top hat plans per year, or *.7 percent* of all ERISA retirement plans.[11] In this light, the issues here do not affect "countless employees." Pet. at 34.

Nor are the lower courts clamoring for direction on top hat plans; indeed, the subject is rarely litigated. While ERISA has generated a voluminous body of decisional law since its adoption in 1974, with thousands of cases interpreting it, only sixty reported decisions have addressed the top hat exception.[12] Furthermore, Petitioner seeks review of only one of the exception's three elements,[13] which further highlights the scant significance the Petition carries. Because review by the Court "would be of no importance save to the litigants

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10. Interview with Elaine Zimmerman, Ph.D, Employee Benefits Security Administration (May 15, 2008).

11. Unlike standard ERISA plans, which need to file a Form 5500 with the Department of Labor each year, a top hat plan only needs to file its disclosure once, and need not inform the Department if the plan terminates or merges. 29 C.F.R. § 2520.104-23(a). Thus, the number of actual top hat plans in existence is actually less than 87,293.

12. A search on Westlaw.com of all federal decisions under the "'Top Hat' Plans" headnote, run on June 5, 2008 yielded 60 results.

13. The District Court identified three elements: a top hat plan must "(1) be unfunded; (2) be maintained primarily for the purpose of providing deferred compensation; and (3) such deferred compensation must be for a 'select group of management or highly compensated employees.' " *Alexander*, 467 F. Supp. 2d at 146 (citing 29 U.S.C. § 1051(2)).

themselves," *Rudolph v. United States*, 370 U.S. 269, 270 (1962), certiorari should be denied.

B. There Are An Insufficient Number of Decisions on the Issues

As Justice Brennan recognized, "there is already in place, and has been ever since [he] joined the Court, a policy of letting tolerable conflicts go unaddressed until more than two courts of appeals have considered a question." Justice William Brennan, *Some Thoughts on the Supreme Court's Workload*, 66 JUDICATURE 230, 233 (1983). Yet only *one* other Court of Appeal has passed on each of the limited subjects presented here: the Sixth Circuit addressed the "bargaining power" issue, *Bakri v. Venture Manufacturing Co.*, 473 F.3d 677 (6th Cir. 2007), and the Second Circuit touched upon the "select group" question.[14] *Demery*, 216 F.3d 283; *see* Pet. at 13, 24. Because any conflict that arguably exists between the Circuits in analyzing the criteria for ERISA's "top hat" exception is underdeveloped at best, and far from intolerable, certiorari is inappropriate at this time. *See Lackey v. Texas*, 514 U.S. 1045 (1995) (approving of the Circuits' role "as laboratories in which [an] issue receives further study before it is addressed by this Court"); *California v. Carney*, 471 U.S. 386, 400 n.11 (1985) ("the Court should not be compelled to intervene

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14. Petitioner argues that the "select group" holding below conflicts with the Sixth Circuit's *Bakri* decision. *See* Pet. at 24. However, *Bakri* only fleetingly refers to this issue in dicta. 473 F.3d at 678. No real conflict is presented where the difference is with another court's obiter dicta. *See Bunting v. Mellen*, 541 U.S. 1019, 1023 (2004) (Scalia, J. dissenting) ("We sit, after all, not to correct errors in dicta").

to eradicate disuniformity when further percolation or experimentation is desirable") (quoting Estreicher & Sexton, *A Managerial Theory of the Supreme Court's Responsibilities*, 59 N.Y.U. L. REV. 677, 716 (1984)).

III. THE UNUSUAL FACTS OF THIS CASE MAKE IT UNSUITABLE FOR REVIEW

This case's complicated and singular circumstances also render it improper for certiorari. Any holding would be confined to this case's facts, and would therefore be of scant applicability to other top hat plan administrators or beneficiaries. As Petitioner admits, the Plans here are "[u]nlike virtually every other 'unfunded' top hat plan." Pet. at 22. This is true in three material ways: the Plans' eligibility requirements, the intent behind the Plans' formation, and the surgeons' ability to influence their terms.

A. The Plans' Design and Eligibility Requirements

Out of necessity, the FRBP and UDC were designed to be different from other top hat plans. Because BSG is a non-profit organization, the Plans had to fulfill two seemingly contradictory requirements: increasing highly profitable physicians' compensation while keeping their salaries beneath the limit imposed by the medical school's non-profit status. Further, unlike most top hat plans, where a pool of eligible participants prospectively stake out their claim to a plan,[15] eligibility for the FRBP

15. *See, e.g.*, *Demery*, 216 F.3d at 285 (plan offered prospectively to assistant vice-presidents, managers, and other senior officers).

and UDC was determined *retrospectively*, based on the previous year's performance. This mechanism allowed BSG to reward the most profitable surgeons (and exclude lesser earners), without having to speculate regarding a surgeon's future productivity. The substantial sums of money deferred to the FRBP or UDC accounts in turn gave these profitable physicians a clear incentive to remain with the organization.

Although dramatically limited by the earn-in requirement, participation in the FRBP and UDC for those who did was mandatory. This plan design requirement found its source in the salary cap. A surgeon who generated NPI surplus could not simply take this money home, as that would impermissibly increase his salary above the Harvard-mandated limit. Rather, the surgeon's only option was to defer the money into these unfunded retirement Plans. Because employees in for-profit industries are not subject to such salary restrictions, the design of such plans tends to be far different and less contingent than those at issue here. *See Alexander*, 467 F. Supp. 2d at 143 ("Generally in the reported cases participation in the unfunded plan at issue was optional").

The unique facts of this case make it unsuitable for review by this Court. The "select group" analysis based on these singular circumstances would have little if any applicability to most other top hat plans, and would do little to advance this otherwise undeveloped area of the law.

B. BSG's Atypical Board of Directors

BSG's unique governance structure also makes this case a poor candidate for certiorari review. As a BSG member, surgeons (like Petitioner) directly chose the organization's Board of Directors; some surgeons even served on the Board and its constituent committees. *Alexander*, 513 F.3d at 41. Through the Board, surgeons were able to alter the policies of the organization. Indeed, BSG surgeons wielded this very power: in 1990, a physician-suggested proposal to revise the terms of the Plans was adopted by the Board. *Id.*

This governance structure bears little resemblance to the reality that most employees face. The typical employee cannot vote in the Board of his choice, but instead is subject to the decisions of Directors chosen by third party stockholders. Similarly, public corporations' Boards are not usually composed of the company's employees, or subject to the very policies they promulgate. Nor do most employees of large corporations have any real ability to petition corporate decision makers regarding any terms of their employment, let alone their benefits and compensation. Again, any bargaining power analysis performed here would have little relevance outside of this litigation.

Since the facts here are so unlike those that would be found in the vast majority of top hat plan cases, of which there are relatively few, certiorari would be of little value except to the parties. Consequently, further review is inappropriate.

CONCLUSION

For the foregoing reasons, the Petition for Writ of Certiorari should be denied.

Respectfully submitted,

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